

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EARNEST HENDERSON, et al,

No C-05-0234 VRW
C-05-4220 VRW

Plaintiffs,

ORDER

v

MIGUEL PRADO, et al,

Defendants.

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Plaintiffs are present and former inmates of the San Francisco county jail who claim that sheriff's deputies violated their due process rights by using excessive force against them during six separate incidents between December 2003 and December 2004. Doc #1. Plaintiffs also allege that the City and County of San Francisco, the San Francisco Sheriff's Department and Sheriff Michael Hennessey established various customs and practices that enabled the deputies to violate plaintiffs' constitutional rights. Doc #1.

On December 1, 2006, the court granted summary judgment to defendants on most of the claims in the case, including all causes of action against the City, the San Francisco Sheriff's

1 Department and Sheriff Michael Hennessey. Doc #167. Remaining in
2 this case are four claims of excessive force against deputy Prado
3 (one plaintiff's allegation includes other deputy defendants). In
4 the summary judgment order, the court also granted defendants'
5 motion for separate trials of each plaintiff's claim under FRCP
6 42(b). Doc #167. At a case management conference shortly
7 thereafter, the court decided to reconsider defendants' motion for
8 separate trials and requested further briefing on the issue. Doc
9 #170. For reasons stated below, the court reinstates its earlier
10 disposition and GRANTS defendants' motion.

I

13 FRCP 42(b) provides that "[t]he court, in furtherance of
14 convenience or to avoid prejudice, or when separate trials will be
15 conducive to expedition and economy, may order a separate trial of
16 any claim * * * or of any issue or of any number of claims * * * ."
17 The decision whether to conduct separate trials under this rule is
18 committed to the trial court's discretion. Hangarter v Provident
19 Life and Accident Insurance Co, 373 F3d 998, 1021 (9th Cir 2004).
20 "To determine whether to consolidate, a court weighs the interest
21 of judicial convenience against the potential for delay, confusion
22 and prejudice caused by consolidation." Southwest Marine Inc v
23 Triple A Machine Shop, Inc, 720 F Supp 805, 807 (ND Cal 1989). See
24 also William W Schwarzer, et al, Federal Civil Procedure Before
25 Trial § 6:101 (2001).

26 Judicial convenience militates in favor of consolidating
27 the trials because some evidence appears to be cross-admissible for
28 each plaintiff, such as testimony from plaintiffs' jail policy

1 experts. But the court must also evaluate the threat of prejudice
2 to defendants, as "[c]onsiderations of convenience and economy must
3 yield to a paramount concern for a fair and impartial trial."

4 Johnson v Celotex Corp, 899 F2d 1281, 1285 (2d Cir 1990).

5 Because plaintiffs' claims arise out of separate
6 incidents, the court informed counsel at the case management
7 conference that a consolidated trial may implicate FRE 404(b)'s
8 prohibition of character evidence. FRE 404(b) forbids admission of
9 other-acts evidence to prove a person's character "to show action
10 in conformity therewith." The rule provides that such evidence
11 "may, however, be admissible for other purposes," such as proof of
12 motive, intent, plan or absence of mistake or accident. FRE
13 404(b). At the case management conference, plaintiffs' counsel
14 suggested that each incident evinces deputy Prado's predilection
15 for violence – a plainly impermissible ground for admission. As
16 the court noted, if evidence of each incident involving Prado is
17 used "to show action in conformity therewith," Prado would be
18 unduly prejudiced by a consolidated trial.

19 In their subsequent briefing, plaintiffs attempt to forge
20 a way around FRE 404(b), but to no avail. Plaintiffs contend that
21 each incident is admissible for the excessive force claims to show
22 Prado's motive, intent, lack of accident or mistake and plan. Doc
23 #173 at 6. In particular, plaintiffs aver that Prado responded to
24 every unwelcome remark from an inmate by "aggressively attacking
25 and beating" the inmate. Doc #173 at 7. Although plaintiffs rely
26 on FRE 404(b), this theory more closely aligns with FRE 406, which
27 provides that "[e]vidence of the habit of a person * * *, whether
28 corroborated or not and regardless of the presence of eyewitnesses,

1 is relevant to prove that the conduct of the person * * * on a
2 particular occasion was in conformity with the habit or routine
3 practice." The Advisory Committee note to FRE 406 clarifies the
4 distinction between character and habit evidence:

5 Character and habit are close akin. Character is a
6 generalized description of one's disposition, or of
7 one's disposition in respect to a general trait, such
8 as honesty, temperance, or peacefulness. "Habit," in
9 modern usage, both lay and psychological, is more
10 specific. It describes one's regular response to a
11 repeated specific situation. * * * A habit * * * is the
12 person's regular practice of meeting a particular kind
13 of situation with a specific type of conduct, such as
14 the habit of going down a particular stairway two
15 stairs at a time, or of giving the hand-signal for a
16 left turn, or of alighting from railway cars while they
17 are moving. The doing of the habitual acts may become
18 semi-automatic.

19 FRE 406 Advisory Committee note (quoting McCormick § 162, 340).

20 The Advisory Committee note further counsels that "evidence of
21 other assaults is inadmissible to prove the instant one in a civil
22 assault action" (emphasis added).

23 In the present situation, an inmate's "comments" do not
24 qualify as a "particular" stimulant as set forth in the Advisory
25 Committee note; nor do the assorted scuffles described by each
26 plaintiff constitute a "semi-automatic" habit of Prado. As the
27 Advisory Committee note makes plain, evidence of prior assaults
28 cannot be regarded as habit evidence under FRE 406.

Likewise, plaintiffs fail to persuade the court that
evidence of Prado's alleged assaults complies with FRE 404(b).
Plaintiffs offer the broad assertion that evidence of each incident
demonstrates Prado's motive and plan to injure inmates at the San
Francisco county jail. See Doc #173 at 7 (claiming that the other-
acts "go directly towards [Prado's] motive, intent, lack of

1 accidents or mistake and plan"). But plaintiffs cannot avoid FRE
2 404(b) by recasting Prado's alleged propensity for violence as a
3 motive or plan. When plaintiffs' theory is stripped of its
4 "semantic camouflage," all that remains is an attempt to establish
5 Prado's propensity to attack inmates. See Clark v Martinez, 295
6 F3d 809, 813 (8th Cir 2002).

7 In the alternative, plaintiffs contend that the other-
8 acts evidence is admissible to show Prado's intent to injure
9 plaintiffs, but intent is not a disputed issue here. In this
10 regard, the present suit is akin to Clark v Martinez, 295 F3d 809,
11 813 (8th Cir 2002), in which plaintiffs attempted to offer evidence
12 that defendant used excessive force on another occasion to prove
13 intent. The Eighth Circuit found decisive the fact that
14 defendant's intent to strike plaintiff was not in dispute, as
15 defendant admitted to using force but maintained that such force
16 was reasonable. This admission undermined the probative value of
17 defendant's other alleged assault, rendering the evidence
18 inadmissible under FRE 403. Here, as in Clark, Prado does not
19 contest his intent to apply force to each plaintiff, mitigating
20 plaintiffs' need to adduce evidence to prove Prado's intent.

21 The court also notes that none of the cases cited by
22 plaintiffs alters the court's conclusion. Both Young v Rabideau,
23 821 F2d 373 (7th Cir 1987), and United States v Wonderly, 70 F3d
24 1020 (8th Cir 1995), are inapposite because defendants in those
25 cases claimed mistake and accident as defenses. No such defenses
26 are proffered by Prado.

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II

In sum, plaintiffs fail to establish that evidence of each incident involving Prado will be admissible to prove intent as to any other incident. Once the court granted summary judgment for the City, the San Francisco Sheriff's Department and Sheriff Michael Hennessey, the remaining common factual thread is the fact that Prado is a defendant. See Enterprise Bank v Saettele, 21 F3d 233, 236 (8th Cir 1994) (abuse of discretion to hold a joint trial without specific common questions of law or fact other than identity of defendant). As such, a consolidated trial invites the jury to infer impermissibly from each alleged assault that Prado has a propensity for violence. Separate trials are necessary to ensure Prado obtains a fair trial. Accordingly, the court GRANTS defendants' motion for separate trials of plaintiffs' claims under Rule 42(b). Pretrial is set for July 10, 2007, at 9:00 am.

IT IS SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge